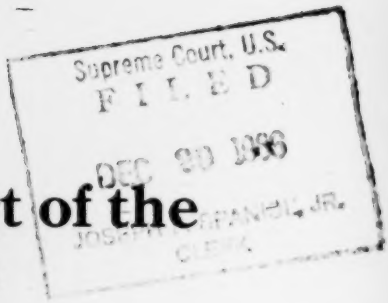
86 - 1085



No. _____

In the Supreme Court of the United States

October Term, 1986

HERBERT PAGEL,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

(Appellate Department of the Superior Court,
State of California, County of Los Angeles
No. CR A 23539)

PETITION FOR WRIT OF CERTIORARI

EDWARD J. HOROWITZ
A Professional Corporation
11661 San Vicente Boulevard
Suite 1015
Los Angeles, California 90049
Telephone: (213) 826-6619
Attorney for Petitioner
HERBERT PAGEL

Westside Law Publishers Los Angeles, California (213) 477-0491

QUESTION PRESENTED

Do the restrictions on a prosecutor's use of peremptory challenges, recently established by this Honorable Court in *Batson v. Kentucky*, 476 U.S. __, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986), also apply to defense counsel? This issue was specifically reserved in footnote 12 of the *Batson* Opinion.

TOPICAL INDEX

Page

Introduction 1

Question Presented 2

Parties To The Proceeding 3

Opinion Below 3

Grounds For Jurisdiction 4

Federal Constitutional Provisions Involved In This Proceeding 4

Statement Of The Case 4

A. Procedural History 4

B. The Jury Selection Proceedings 5

Legal Discussion
Of Reasons For Certiorari

Certiorari Should Be Granted To Review The Issue Specifically Reserved By This Honorable Court In *Batson v. Kentucky*, i.e., Whether The Constitutional Limitations On A Prosecutor's Use Of Peremptory Challenges Should Also Be Imposed Upon Defense Counsel 9

A. The Issue Is Important and Suitable For Review By Writ of Certiorari 9

B. The *Batson* Rule Should Not Apply To Defense Counsel 10

Conclusion 16

Appendix A A1

Appendix B B1

TABLE OF AUTHORITIES CITED

Cases Page

Batson v. Kentucky, supra, 476 U.S. ___, 90 L.Ed.2d 69, 106 S.Ct. 1712 ..... 2, 3, 6, 9, 10, 12, 13, 16
Berger v. United States, 295 U.S. 78, 55 S.Ct. 6229 ... 12
Duncan v. Louisana, 391 U.S. 145, 88 S.Ct. 1444 (1968) 11
Lewis v. United States, 146 U.S. 370, 13 S Ct. 136 (1892) 15
People v. Trevino, 39 Cal.3d 667, 217 Cal.Rptr. 652, 704 P.2d 719 (1985) 12
People v. Wheeler, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978) 3, 6, 8
Pointer v. United States, 151 U.S. 396, 14 S.Ct. 410 (1894) 16
Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824 (1965) 10
U.S. v. Marchant, 4 Mason 160, 12 Wheat 480 15

Statutes

California Penal Code
§1070(a) 5
California Vehicle Code
§20001 ..... 4, 5
28 United States Code
§1257(3) 4

Rules

California Rules of Court
Rule 62 3

Constitutional Provisions

United States Constitution
Sixth Amendment 4, 16
Fourteenth Amendment 4, 10, 11, 16

Other Authorities Cited

4 Blackstone's Comm. 353 15
The Defendant's Right To Object To Prosecutorial Use Of The Peremptory Challenge (1979) 92 Harv. L.Rev. 1770 ..... 14, 15

In the Supreme Court of the United States

October Term, 1986

HERBERT PAGEL,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioner, who is Caucasian, was accused of "hit and run" driving where the victim and all prosecution witnesses were black. During jury selection, the defense used three of its first four peremptory challenges on black jurors. The trial court rejected defense counsel's reasons for excusing the three black jurors, dismissed the jury venire and ordered that a new jury panel be called. Jury selection began anew, subject to the restrictions imposed during the first selection process. Petitioner was ultimately convicted.

This petition thus squarely presents the issue reserved by footnote 12 of *Batson v. Kentucky, supra*, 476 U.S. __, 90 L.Ed.2d 69, 106 S.Ct. 1712, i.e., whether the restrictions on a prosecutor's use of peremptory challenges — required by the Equal Protection Clause — should also apply to defense counsel.

Without question, the issue is a difficult one with salient points that could be presented by each side. However, several considerations demonstrate a defendant should not be restricted in the same fashion as the prosecution, including (1) the fact that *Batson* is substantially based on the Equal Protection Clause's restrictions on *state* action, (2) the difference in a criminal case between the respective duties of the prosecutor as a representative of the state and defense counsel as the representative of an individual defendant, (3) the uniquely personal involvement of the defendant in a criminal prosecution that could lead to his imprisonment, and (4) the notion that a criminal defendant's right to jury trial should not be impinged at all, lest the system be perceived as compromising this most hallowed of all constitutional rights.

QUESTION PRESENTED

Therefore, petitioner asks this Honorable Court to grant certiorari to review the following important issue:

Do the restrictions on a prosecutor's use of peremptory challenges, recently established by this Honorable Court in *Batson v. Kentucky, supra*, 476 U.S. __, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986), also apply to defense counsel? This issue was specifically reserved in footnote 12 of the *Batson* Opinion.

PARTIES TO THE PROCEEDING

Petitioner is Herbert Pagel, defendant and appellant below. Respondent is the People of the State of California, plaintiff and respondent below. There are no other parties to the proceeding.

OPINION BELOW

Petitioner's appeal was heard by the Appellate Department of the Superior Court of the State of California, County of Los Angeles. In an opinion filed September 25, 1986, the Appellate Department affirmed the judgment of conviction, concluding that it was bound by the decision of the California Supreme Court in *People v. Wheeler,* 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978). The Appellate Department's Opinion referred to this Honorable Court's opinion in *Batson*, but only in a footnote and without any reference to the equal protection rationale of that decision. (A copy of the Appellate Department's opinion is attached hereto as Appendix A. The opinion is published at 186 Cal.App.3d Supp. 1, __ Cal.Rptr. __.)

By virtue of the Appellate Department's certification that its opinion should be published, the matter was automatically presented to the Court of Appeal of the State of California, Second Appellate Distict, for a discretionary determination whether to transfer the appeal for decision to that Court. (See Rule 62, Cal. Rules of Court.) On October 30, 1986, the California Court of Appeal issued its order refusing to transfer the matter. (A copy of the October 10, 1986 Order is attached hereto as Appendix B.)

Accordingly, the appeal became final under California law on October 30, 1986.

GROUNDS FOR JURISDICTION

Petitioner seeks review of the Appellate Department's opinion, pursuant to 28 U.S.C. sec. 1257, subd. (3), since that decision may not be reviewed by any higher court of the State of California.

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED IN THIS PROCEEDING.

This proceeding involves the following Federal Constitutional provisions:

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

United States Constitution, Amendment XIV:

> "Section 1. . . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Procedural History.

Petitioner was charged with one misdemeanor count of violating California Vehicle Code section 20001, "hit and run" driving. During the course of voir dire, the court invited a prosecution motion to dismiss the jury panel and quash the remaining venire on the ground the defense was exhibiting a pattern of excusing black jurors with peremptory challenges. The next day, after argument, the court granted the motion.

The matter was then reassigned for trial before a new judge. A new jury was selected and petitioner was found guilty as charged. Petitioner was placed on summary probation for 36 months on conditions including service of 30 days in the county jail.

A timely appeal was taken by petitioner's present counsel to the Appellate Department of the Superior Court of the State of California, County of Los Angeles. As noted above, the Appellate Department affirmed the judgment of conviction by opinion of September 25, 1986. (186 Cal.App.3d Supp. 1, __ Cal.Rptr. __. See Appendix A.) The Court of Appeal of the State of California, Second Appellate District, declined to order transfer of the cause (Appendix B) and, therefore, the appeal became final as of the date of the latter order, October 30, 1986.

B. The Jury Selection Proceedings.

The facts pertaining to the jury selection proceedings are related in the Appellate Department's Opinion (Appendix A.) For convenience, those facts may be summarized as follows:

Voir dire of the jurors commenced routinely. [12/11/84 R.T. 1-74.][1] The prosecution exercised its first peremptory on juror Virginia Brown, who was Caucasian.[2] [12/11/84 R.T. 74, 146.] The defense's first peremptory was against Darrell Street, who was black. [12/11/84 R.T. 83, 111.] The prosecution's second peremptory was against Paul Young, who was Caucasian. [12/11/84 R.T. 90, 146.] The second defense

[1]Reporter's Transcript references are indicated by the date of the transcript and the page. Line references follow the page wherever quotations are recited.

[2]Each side had a maximum of ten peremptory challenges since petitioner faced a maximum sentence of one year in jail. (Cal. Penal Code sec. 1070(a); Cal. Vehicle Code sec. 20001.)

peremptory was against Carol Pinkney, who was black. [12/11/84 R.T. 97, 146.] The prosecution's third peremptory was against C. L. Churchhill, who was Caucasian. [12/11/84 R.T. 103, 146.] The third defense peremptory was against James Mitchell, who was black. [12/11/84 R.T. 111, 146.]

Following the latter peremptory, the following dialogue occurred at bench:

> "THE COURT: Are you [prosecutor] concerned about a Wheeler[3] issue?
>
> "MS. TSO [prosecutor]: Yes, your Honor.
>
> "THE COURT: So am I."
> [12/11/84 R.T. 111:12-14.]

The court noted that all three defense peremptories had been exercised against black jurors, that the defendant is Caucasian while the alleged victim and prospective witnesses were all black. [12/11/84 R.T. 112-113.] The court then indicated it would reserve ruling on the *Wheeler* issue. [12/11/84 R.T. 114-115.] Defense counsel stated he had no plans to challenge the one remaining black juror on the panel. The prosecutor noted there was only one other black juror among the venire. [12/11/84 R.T. 115.] Voir dire continued.

The prosecution then exercised its fourth peremptory against Sherry Tatge, who was Caucasian. [12/11/84 R.T. 122, 146.] The defense exercised its fourth peremptory against Hannah Han-Rosebrock, who was Caucasian. [12/11/84 R.T. 127, 149-150.] Proceedings were continued to the next day before any further peremptories were exercised.

---

[3]Referring to *People v. Wheeler, supra,* 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748, which established a rule in California similar to *Batson.*

The next day, the court asked defense counsel to explain the basis for his peremptories against the three black jurors. After noting the prosecutor had used all four of her peremptories against Caucasian jurors, defense counsel explained he excused juror Street because he lived close to the area where the accident occurred, because he was single, and because he had nodded off twice during the proceedings. [12/11/84 R.T. 146-147.] Counsel stated he excused juror Pinkney because she appeared scatter-brained, worked in a hospital and had observed persons with various injuries. Counsel did not want such a person deciding a hit-and-run case involving injuries to a two-year-old victim. Although juror Pinkney had had family problems with the police and had herself been arrested, counsel felt that since police involvement in the present case was minimal, that was not a factor with any relevance. [12/11/84 R.T. 148-149.] Finally, counsel excused juror Mitchell because he had once stood up in the back of the courtroom and caused a disturbance, requiring the court to ask him to take his chair, and because he was employed with the Urban League, indicating that he was active in black causes which appeared inappropriate in a case with a young black victim. [12/11/84 R.T. 149.] Finally, counsel noted that he had used one of his peremptories against a Caucasian juror and that he had no intention to use a peremptory against the one black juror who was still on the panel. [12/11/84 R.T. 149-150.]

The court found "the defense has not been sustained as to all of the questioned challenges, particularly as applied to one of the jurors, Mr. Street." [12/11/84 R.T. 153:16-18.] The court then dismissed the panel which had thus far been selected and quashed the remaining venire. [12/11/84 R.T. 153-154.]

Subsequently, another jury was selected with defense counsel subject to the *Wheeler* restrictions. That jury found petitioner guilty as charged.

LEGAL DISCUSSION OF REASONS FOR CERTIORARI

CERTIORARI SHOULD BE GRANTED TO REVIEW THE ISSUE SPECIFICALLY RESERVED BY THIS HONORABLE COURT IN *BATSON V. KENTUCKY*, I.E., WHETHER THE CONSTITUTIONAL LIMITATIONS ON A PROSECUTOR'S USE OF PEREMPTORY CHALLENGES SHOULD ALSO BE IMPOSED UPON DEFENSE COUNSEL.

A. The Issue Is Important and Suitable For Review By Writ of Certiorari.

Without question, the issue presented by this petition is an important one and suitable for review by this Honorable Court on a writ of certiorari. In *Batson*, this Court specifically noted the issue and stated:

> "We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." (476 U.S. at ___, 106 S.Ct. at 1718, fn. 12.)

This Honorable Court has also indicated the importance of the *Batson* rule, by granting certiorari on the issue whether the rule should be applied retroactively. (See Docket Nos. 85-5221 and 85-5731.)

Surely, the issue whether the *Batson* rule should be applied to defense counsel is at least as important as the retroactivity of that rule and, indeed, is arguably as important as the underlying rule itself since it goes to the heart of a defendant's right to a jury trial.

The significance of the issue and of the need for this Honorable Court to decide it is also underlined by the significance of the considerations, both pro and con,

which have been suggested for determination of the question itself. As discussed in more detail below, those considerations include the desire of the State to assure equal access to participation on juries to all members of society, as well as numerous considerations bearing on a criminal defendant's individual rights to equal protection of the laws and to a jury trial.

B. The *Batson* Rule Should Not Apply To Defense Counsel.

The primary reason why the *Batson* rule should not be applied to defense counsel is that the rule is meant to protect an *individual defendant's* rights under the Equal Protection Clause of the Fourteenth Amendment. This is apparent from *Batson*'s frequent references to the Equal Protection Clause and/or to the necessity of protecting an individual defendant from discrimination by the State. The following are some examples from the opinion:

> 1. "This case requires us to re-examine . . . the evidentiary burden placed on a criminal defendant who claims that he has been denied *equal protection* through the State's use of peremptory challenges. . . ." (106 S.Ct. at 1714; emphasis added.)
>
> 2. ". . . a 'State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.' " (106 S.Ct. at 1716, citing *Swain v. Alabama*, 380 U.S. 202, 203-204, 85 S.Ct. 824, 826-827 (1965).)
>
> 3. "*The Equal Protection Clause guarantees* the defendant that *the State will not* exclude

members of his race from the jury venire on account of race. . . ." (106 S.Ct. at 1717; emphasis added.)

4. "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection. . . ." (106 S.Ct. at 1717.)

5. "Those on the venire must be 'indifferently chosen' to secure the defendant's right under the Fourteenth Amendment. . . ." (106 S.Ct. at 1771; footnote omitted.)

6. ". . . a defendant's right to be tried by a jury of his peers is designed 'to prevent oppression by the Government.' " (106 S.Ct. at 1717, citing *Duncan v. Louisiana*, 391 U.S. 145, 155, 88 S.Ct. 1444, 1451, fn. 8 (1968).)

7. ". . . the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice. . . ." (106 S.Ct. at 1718.)

8. "Accordingly, the component of the jury selection process at issue here, the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause.'" (106 S.Ct. at 1718.) (This quotation is immediately followed in the opinion by footnote 12 in which this Honorable Court states, "We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel.")

9 ". . . our decision enforces the mandate of equal protection and furthers the ends of justice." (106 S.Ct. at 1724.)

Concededly, there are references in *Batson* to grounds that could be considered as supporting a rule that defense counsel are also limited in the exercise of their peremptory challenges. Most notably, these references include:

> 1. "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." (106 S.Ct. at 1718.)
>
> 2. "In view of the heterogeneous population of our nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race." (106 S.Ct. at 1724.)

Nevertheless, petitioner submits that in balancing the considerations noted in *Batson*, a determination upholding a defendant's right to unfettered use of peremptory challenges is the wiser choice because that result will ensure the sanctity of the defendant's centuries old right to jury trial, while having very little effect on the right of all citizens to participate in the jury system or on the level of respect in which our criminal justice system is held.

A further and significant reason for limiting the *Batson* rule to prosecutors follows from the distinct difference between the ethical duties of prosecutors and defense attorneys. A prosecutor has a dual role "as the defendant's adversary and as a guardian of the defendant's constitutional rights." (*People v. Trevino*, 39 Cal.3d 667, 681, 217 Cal.Rptr. 652, 704 P.2d 719 (1985). See also *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629 [The interest of the prosecution "is not that it shall win a case, but that justice shall be done."]) On the other hand, defense counsel is ethically obligated

to devote his energies solely to the proper defense of his client.

Accordingly, it was quite proper for this Honorable Court to hold in *Batson* that the prosecutor's role "as a guardian of the defendant's constitutional rights" requires restrictions on the prosecutor's use of peremptory challenges when those challenges impinge on the defendant's right to equal protection. Conversely, however, defense counsel's role in a criminal prosecution is more limited — he or she is ethically obligated to focus his or her efforts solely on behalf of the defendant. Defense counsel should therefore not be answerable to the court or to the State for tactical decisions that are and always have been within the purview of a defense counsel's duties.

Nor should the result be swayed by the generalized consideration that application of the *Batson* rule to defense counsel would be "desirable." There are many "desirable" restrictions that could be, but are not, placed upon defense counsel because of more significant countervailing reasons designed to protect a criminal defendant's rights. These include the obligation of defense counsel to maintain in confidence statements made to him or her by a defendant, even where those statements show the defendant's guilt and would allow a conviction to be obtained where otherwise one would not.

Furthermore, a criminal defendant has a unique personal interest in a case and, to avoid juror bias in favor of the prosecution, it is fair "to grant a defendant an opportunity to exclude a limited number of jurors [which he or] she intuitively dislikes or distrusts, regardless of the basis for the antagonism. . . ." (Note, The Defendant's Right To Object To Prosecutorial Use

Of The Peremptory Challenge (1979) 92 Harv.L.Rev. 1770, 1787.) After all, the defendant is the only person involved in a criminal trial who faces the possibility of imprisonment. Thus, the defendant's ancient right to exclude particular jurors for reasons which cannot readily be articulated and which may even be irrational is both necessary and desirable so that, if convicted, the defendant may not harbor any resentment or hostility over the process which led to the conviction.

The above law review commentary is also pertinent for the following aspects of its analysis:

> ". . . . Unlike the prosecutor, the defendant is not a state actor, so [his or] her use of group stereotypes as the sole criterion for peremptory challenges in no way reflects state support for such conduct. Since the defendant does not represent the state, there is reason to permit the defendant to use the peremptory challenge for any reason, even on the sole basis of group affiliation." (92 Harv.L.Rev. at 1786; footnotes omitted.)

The same commentary provides a factual as well as legal basis for its conclusion:

> ". . . . The defendant's use of the challenge should not be so limited for two reasons. First, the availability of the peremptory challenge may be more important to the defendant than to the government; one study showed that 25% to 30% of the members of the federal and state jury pools believe a defendant is probably guilty once indicted, while another showed that only 5% of the jury pool had animosity toward the government. But more important, it may be

> only fair to grant a defendant an opportunity to exclude a limited number of jurors [he or] she intuitively dislikes or distrusts, regardless of the basis for the antagonism, since the defendant's involvement in [the] trial is so personal and immediate. The prosecutor, on the other hand, has no such personal stake in the use of the peremptory challenge." (92 Harv.L.Rev. at 1787; footnotes omitted.)

The above note refers to this Court's approving reference to Blackstone's Commentaries:

> "The right of challenge . . . has always been held essential to the fairness of trial by jury. As was said by Blackstone and repeated by Mr. Justice Story: 'In criminal cases . . . there is . . . allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all, which is called a "peremptory challenge;". . . . As everyone must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner . . . should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike.' " (*Lewis v. United States,* 146 U.S. 370, 376, 13 S.Ct. 136, 138 (1892), quoting 4 Blackstone's Comm. 353, and *U.S. v. Marchant*, 4 Mason 160, 162, 12 Wheat 480, 482.)

And as reiterated by this Court in *Pointer v. United States,* 151 U.S. 396, 408, 14 S.Ct. 410, 414 (1894):

> "The [peremptory challenge] is one of the most important of the rights secured to the accused. . . . Any system for the empaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right must be condemned."

In summary, although reasons of substance may be given for application of the *Batson* rule to defense counsel, on balance the reasons for limiting the rule to prosecutors should prevail. The defendant's time-honored right to unfettered peremptory challenges and his individual rights against the power of the State, guaranteed by the Sixth and Fourteenth Amendments, must outweigh the very limited benefit to general societal goals such as equal access to participation in the jury system.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Honorable Court grant this Petition For Writ of Certiorari to review the issue reserved in *Batson*, i.e., whether the rule established in that decision should be applied to defense counsel.

Respectfully submitted,

EDWARD J. HOROWITZ
A Professional Corporation

EDWARD J. HOROWITZ

Attorney for Petitioner
HERBERT PAGEL

APPENDIX

FILED
SEP 25 1986
FRANK A. ZOLIN, County Clerk
Alan Hardey
BY ALAN HARDEY, DEPUTY

CERTIFIED FOR PUBLICATION

APPELLATE DEPARTMENT
OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. HERBERT PAGEL, Defendant and Appellant.	Superior Ct. No. CR A23539 Municipal Court of the Los Angeles Judicial Dist. No. V 182550 OPINION AND JUDGMENT

Appeal by defendant from Judgment of the Municipal Court,

Larry Paul Fidler, Judge.

JUDGMENT AFFIRMED.

For Appellant - Edward J. Horowitz

For Respondent - James K. Hahn, City Attorney
Greg Wolff, Deputy City Attorney
By Arthur B. Walsh, Deputy City Attorney

APPENDIX A

-o0o-

Defendant Herbert Pagel appeals from a judgment of conviction following a jury trial at which time he was found guilty as charged in a misdemeanor complaint of violating Vehicle Code section 20001 (hit-and-run resulting in injury).

His sole assignment of error concerns the trial court's granting of the People's motion to dismiss the selected jurors and to quash the remaining first panel of prospective jurors on the ground that defendant had exercised his peremptory challenges systematically to exclude blacks from the jury.

We find no error.

I. PROCEDURAL AND FACTUAL BACKGROUND:

The record, in relevant part, reflects the following transpired during the initial jury selection process on December 11, and 12, 1984.

During voir dire defendant, through his attorney, exercised his first three peremptory challenges against prospective jurors Darrell S. Street, Carol Pinkney, and James T. Mitchell, each of whom is black.

Street stated that he lived in Los Angeles in the general vicinity of Washington and Crenshaw Boulevards. He was single and worked as a billing supervisor in the home delivery department of the Los Angeles Times. He had no prior jury experience. Street disclosed that his brother was a retired deputy sheriff, that several of his neighbors were attorneys, and that a Court of Appeal Justice lived nearby.

Pinkney stated that she lived in Inglewood and that she was separated from her husband. She also disclaimed any prior jury experience. Out of the presence of the

other jurors, Pinkney disclosed that her estranged husband had been shot by the police when he was arrested for being under the influence of PCP, that her brother had been arrested for carrying a loaded weapon in his vehicle, and that she herself had been recently stopped at gun point by police officers who believed that the vehicle she was driving, which was her own, had been stolen. Pinkney further disclosed that she had been in four automobile accidents. She also stated that during the course of her employment as a ward clerk in a hospital she occasionally saw victims of automobile accidents.

Mitchell stated that he lived in the central part of Los Angeles and that he was single. He was employed as a recruiter for the Urban League. Mitchell expressed several complaints against law enforcement officers and the court system. In particular he was concerned about the treatment his brother had received many years earlier after his brother was found to be insane when he killed Mitchell's father.

Following defendant's third peremptory challenge, the prosecutor approached the bench and expressed her concern about defendant's apparent attempts to excuse all prospective black jurors. The trial court agreed that her concern was warranted under *Wheeler*. (*People v. Wheeler* (1978) 22 Cal.3d 258.) The court then pointed out that defendant is white while both the victim and the People's witnesses are all black.

Defense counsel responded by positing various reasons for excusal of the three black prospective jurors. He asserted that Mitchell was excused because he perceived Mitchell as a person who had "a chip on his shoulder with the entire court system" and who could not render a fair and impartial decision. Defense counsel also

claimed that Mitchell's negative attitude towards law enforcement would be unimportant to his defense strategy since law enforcement played a minimal role in this case.

The court expressly disagreed with this latter claim, pointing out that the testimony of the black investigating officer would bring in certain statements made by defendant.

As for Pinkney, defense counsel explained that he believed that she also had so many problems with the court system that she could not be fair and impartial.

Finally, defense counsel stated that he "really [did not] have an answer regarding Mr. Street as I do with the other two." He added, however, that regardless of race, he would have excused Pinkney and Mitchell.

When defense counsel announced that he had no plans to challenge the remaining black on the panel, the prosecutor pointed out that there were no black males remaining and that the one remaining black was Mrs. Harris, a female.

The court deferred ruling on the *Wheeler* motion, and voir dire continued. Defendant later exercised a fourth peremptory challenge to excuse a white juror, Hannah Han-Rosebrock.

Prior to jury selection the next morning, the People presented additional argument in support of their motion. The court then found that the People had made a prima facie showing that defendant had utilized peremptory challenges systematically on the basis of group bias. It next invited further explanations from defense counsel.

In response, defense counsel asked the court to consider his statements made on the previous day and

added the following explanations: He had excused Street "solely on the basis that I thought he lived too close to the area where the accident occurred. He was single. I also noted, judge, that he was nodding off two times way before I dismissed him." He excused Pinkney, because she was "scatterbrained", worked in a hospital, and had seen gunshot wounds and stabbings. She was therefore not someone defendant wanted to be deciding his fate. As for Mitchell, he reiterated his concern with Mitchell's law enforcement problems, expressed his concern that Mitchell had caused an earlier disturbance in the court, and stated his belief that "a person working on the Urban League" should not be deciding what happens to defendant.

Defense counsel reminded the court that he had previously indicated that he would not challenge Mrs. Harris, who was in fact selected as a juror. He argued that "we are making too much out of the black race here" and accused the People of attempting to exclude whites systematically by dismissing four white jurors.

The prosecutor took exception to defense counsel's stated reasons, essentially arguing that defense counsel was trying to cover his tracks with respect to the three black prospective jurors who had been peremptorily excused. She pointed out that Mrs. Harris, who is black and was not peremptorily challenged, had a 1-1/2 year old child. The black victim was only 2 years old at the time of the incident. She also pointed out that defense counsel only challenged the white prospective juror *after* the *Wheeler* motion was made and that this particular person was in fact on the panel prior to Pinkney and Mitchell, who had been called to fill in slots left vacant by excused prospective jurors. The prosecutor also disclaimed any personal knowledge of Street nodding in court.

The trial court rejected the explanations proffered by defense counsel. The court announced that it was not satisfied that the peremptory challenges had been exercised for specific bias and found that the stated grounds were not reasonably relevant to the particular case on trial. The court noted that defense counsel had conducted only minimal voir dire questioning of the three excused prospective black jurors, who were "two males and a female with different and varied life experiences and backgrounds." The court then dismissed the jury members selected thus far and quashed the remaining venire.

On December 13, 1984, a new jury venire was empaneled. On December 17, 1984, a jury was selected without further objections by the prosecution or any objections by the defense as to the jury selection process.

II. DISCUSSION

A peremptory challenge is "an objection to a juror for which no reason need by given, but upon which the court must exclude him." (Pen. Code, § 1069.)

In *People v. Wheeler, supra,* our Supreme Court held that "the use of peremptory challenges to remove prospective jurors on the ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution."[1] (*Wheeler, supra,*

---

[1]The right to a trial "by impartial and unprejudiced jurors" is implicit in the right to a jury trial guaranteed by article I, section 16, of the California Constitution. (*Wheeler, supra,* at p. 265.) It is now settled, however, that the Sixth Amendment's express guarantee of an impartial jury is applicable to the states through the Fourteenth Amendment to the federal Constitution. (*Duncan v. Louisana* (1968) 391 U.S. 145, 149.)

Recently, the United States Supreme Court in *Batson v. Kentucky* (1986) 476 U.S. ___, 90 L.Ed.2d 69, 106 S. Ct. 1712 held that

22 Cal.3d 258, 276-277.) The *Wheeler* court explained that "[i]f a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court." (*Id.*, at p. 280.)

Initially, defendant argues that the *Wheeler* peremptory challenge restriction applies only to peremptory challenges exercised by the prosecution. He concludes that the court therefore erred in finding that the *Wheeler* principle applied to defendant's use of peremptory challenges against the three black prospective jurors.

We disagree.

"It has always been understood that public support for a system of justice depends not only on the capacity of that system to render justice in fact, but also on its ability to project to the parties and public an unimpeachable image of fairness. The peremptory challenge has long acted as a fixative for preserving that

---

"the State's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause. . . . [T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." (*Id.*, at pp. 82-83; fn. omit.) The Supreme Court, however, stated: "We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." (*Id.*, at fn. 12.) Nonetheless, the court observed that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system. Discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.' " (*Id.*, at pp. 81-82.)

image. Its purpose has always been to insure that criminal trials are conducted before jurors who not only proclaim their impartiality, but whose ability to be evenhanded is not seriously questioned by the parties. (*People v. Williams* (1981) 29 Cal.3d 392, 404; fn. omit.) "It is not 'a function of the examination of prospective jurors . . . to prejudice the jury for or against a particular party. . . .' " (*Id.*, at p. 408.)

In *Wheeler* the court expressly announced that "the People no less than individual defendants are entitled to a trial by an impartial jury drawn from a representative cross-section of the community. Furthermore, to hold the contrary would frustrate other essential functions served by the requirement of cross-sectionalism [such as legitimating the judgments of the courts, promoting citizen participation in government, and preventing further stigmatizing of minority groups]. . . . For example, when a white defendant is charged with a crime against a black victim, the black community as a whole has a legitimate interest in participating in the trial proceedings; that interest will be defeated if the prosecutor does not have the power to thwart any defense attempt to strike all blacks from the jury on the ground of group bias alone." (*Wheeler, supra,* at fns. 6, 29; see also, *People v. Trevino* (1985) 39 Cal.3d 667, 679.)

Defendant's attempt to derogate the significance of such language as dicta is of no avail. It was in the context of expressly finding that the People have "the right to object to the same misuse of peremptory challenges on the part of defense counsel" "under the constitutional theory we adopt herein . . ." that the *Wheeler* court made the observations quoted in the preceding paragraph. Accordingly, such language does not constitute merely an "aside" or a "throw-away point". Instead, it reflects

the mandate of the California Supreme Court, which is a matter that this court cannot disregard.[2]

Defendant's remaining contention concerns the trial court's finding that defendant failed to sustain his burden to justify his use of the peremptory challenges in question.[3] Essentially, he asserts that the court was bound to accept his explanations.

We again disagree.

"If the court finds that a prima facie case has been made, [which defendant here concedes,] the burden shifts to the other party to show if he can that the peremptory challenges in question were not predicated on group bias alone. The showing need not rise to the level of a challenge for cause. But to sustain his burden of justification, the allegedly offending party must satisfy the court that he exercised such peremptories on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses --- i.e., for reasons of specific bias. . . . He, too, may support his showing by reference to the totality of the circumstances: for example, it will be relevant if he can demonstrate that

---

[2]In *People v. Trevino* (1985) 39 Cal.3d 667 our Supreme Court stated: "In *Wheeler* we suggested that the People also have the right under the representative cross-section requirement to challenge the defendant's use of peremptory challenges. That issue is not now before this court." (*Id.*, at fn. 10.) We note that the word "suggested" detracts somewhat from the force of what we perceive the *Wheeler* mandate to be. Nonetheless, the *Trevino* court did not in fact disapprove or overrule the language in *Wheeler* giving rise to such right. We therefore conclude that the mandate remains intact and must be implemented on the facts presented in the present case.

[3]Defendant's justification below that the People systematically excluded white potential jurors must be rejected summarily. Defendant cannot sustain his burden "by attempting to cast a different burden on his opponent." (*Wheeler, supra*, at fn. 30.)

in the course of this same voir dire he also challenged similarly situated members of the majority group on identical or comparable grounds. And again we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*Wheeler, supra*, at pp. 281-282.)

In the present case the trial court expressly stated that it was not satisfied with the explanations put forward by defendant, especially as to prospective juror Street. We uphold the court's rejection of defendant's explanations as unsatisfactory.

"[I]t is imperative, if the constitution guarantee is to have real meaning, that once a prima facie case of group bias appears the allegedly offending party [is] required to come forward with the explanation to the court that demonstrates other bases for the challenges *and* that the court satisfy itself that the explanation is genuine. This demands of the trial judge a sincere and reasoned attempt to evaluate the . . . explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the [offending party] has examined members of the venire and has exercised challenges for cause or peremptorily. . . ." (*People v. Hall* (1983) 35 Cal.3d 161, 167-168.)

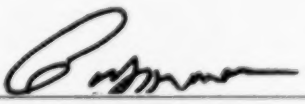
From the foregoing recital of law it is clear that the trial court's determination of specific bias or group bias revolves around the issue of credibility.[4] "Questions as

---

[4]In *Wheeler* the court deemed "it unnecessary to remind counsel, whether prosecutor or defender, of their legal and ethical responsibilities to seek justice and to offer only truthful reasons for the exercise of peremptory challenges." (*Wheeler, supra*, at fn. 11.)

to the credibility of witnesses and the weight to be given their testimony are for the trier of facts, and, . . . it is the trier of facts who must determine to what extent testimony is to believed or disbelieved." (*Pierson v. Superior Court* (1970) 8 Cal.App.3d 510, 518.) Similarly, it is the function of the trial court to evaluate and determine the genuineness of the explanations offered by the offending party to rebut the inference of impermissible group bias. (*Hall, supra*, at pp. 167-168.) As an appellate court, we cannot retry credibility. (*People v. French* (1978) 77 Cal.App.3d 511, 523.) Instead, we must defer to the trial court's assessment of the proffered explanations. (See, e.g., *People v. Clay* (1984) 153 Cal.App.3d 433, 453; cf. *Clay, supra*, at pp. 455-456; *People v. Randle* (1982) 130 Cal.App.3d 286, 295; see also, *People v. Johnson* (1978) 22 Cal.3d 296, 299-300 [where proffered reason was insufficient as a matter of law].)

The judgment is affirmed.

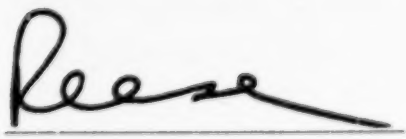


Presiding Judge

We concur.



Judge



Judge

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. HERBERT PAGEL, Defendant and Appellant.	B023570 (Super.Ct.No. CR A23539) (Mun.Ct. of the Los Angeles Jud.Dist.No. V 182550) MEMORANDUM

COURT OF APPEAL - SECOND DIST.
FILED
OCT 30 1986
CLAY ROBBINS, JR. Clerk
Deputy Clerk

THE COURT:

The opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles having been filed on September 25, 1986, that court having made its order for publication of the opinion in the Advance Appellate Reports, and that opinion having been examined by the Court within thirty (30) days after the decision of the Appellate Department became final, this court has determined that transfer under California Rules of Court, rule 62, subdivision (a) is unnecessary.

APPENDIX B

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on December 29, 1986, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Clerk, Appellate Department
of the Superior Court
Department 70
111 North Hill Street
Los Angeles, California 90012

Clerk, California Court of
Appeal
3580 Wilshire Boulevard
Room 301
Los Angeles, California 90010

Office of the City Attorney
200 North Main Street
Room 1700
Los Angeles, California 90012

Honorable Larry Fidler
Criminal Courts Building
210 West Temple Street
Los Angeles, California 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 29, 1986, at Los Angeles, California.

Sharon L. Stewart
(Original signed)

Supreme Court, U.S.
FILED
MAR 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1085

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

HERBERT PAGEL,
Petitioner,

VS.

STATE OF CALIFORNIA,
Respondent.

(To the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, No. CR A 23539)

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES K. HAHN,
City Attorney of Los Angeles
WILLIAM N. STERLING,
Deputy City Attorney
LAURENCE WAYNE MOONEY,
Deputy City Attorney
(Counsel of Record)
1600 City Hall East
200 North Main Street
Los Angeles, California 90012
Telephone: (213) 485-5483

Attorneys for Respondent
State of California

Bowne of Los Angeles, Inc., Law Printers. (213) BOWNE CO

QUESTION PRESENTED

Did the state trial court violate petitioner's Sixth Amendment right to an impartial jury trial or deny him due process or equal protection of the laws as guaranteed by the Fourteenth Amendment by preventing him from excusing prospective jurors solely on the basis of their race?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
ARGUMENT	3
A. The Constitutional Issues Raised in the Petition for Certiorari Were Neither Raised Nor Addressed in the State Courts	3
B. Petitioner Posed No Constitutional Objection to the Makeup of the Jury Which Heard the Evidence and Rendered the Verdict	5
C. The Appellate Department's Holding Restricting Petitioner's Peremptory Challenges Is Consistent with Federal and State Authority on that Developing Issue	7
D. The State Trial Court Restriction Upon the Exercise of Petitioner's Peremptory Challenges Was Not Violative of the Sixth or Fourteenth Amendments	9
1. States Need Not Allow Defense Peremptory Challenges. Once a Sate Permits Such Challenges, It May Restrict Them in any Reasonable Manner	10
2. Petitioner Had No Constitutional Right to a Petit Jury Panel from which Blacks Were Excluded Solely on the Basis of Race	17

Page

3. The State of California Was Entitled to a Fair Trial before Impartial Jurors 19

4. All Citizens, Regardless of Race, Must Be Allowed to Participate in Jury Deliberations in Criminal Cases 21

CONCLUSION 23

TABLE OF AUTHORITIES

United States Supreme Court

Page

Apodaca v. Oregon, 406 U.S. 404, 32 L.Ed.2d 152, 92 S.Ct. 1628 (1972) 13, 14, 18

Ballard v. United States, 329 U.S. 187, 91 L.Ed. 181, 67 S.Ct. 261 (1946) 22

Batson v. Kentucky, 476 U.S. ___, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986) 4, 5, 7, 8, 12, 17, 18, 19, 21

Beck v. Washington, 369 U.S. 541, 8 L.Ed.2d 98, 82 S.Ct. 955 (1962) 4

Brown v. North Carolina, 479 U.S. ___, 93 L.Ed.2d 373, 107 S.Ct. 423 (1986) 22

Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1161 (1969) 4

Douglas v. California, 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814 (1963) 13

Frazier v. United States, 335 U.S. 497, 93 L.Ed. 187, 69 S.Ct. 201 (1948) 6

Glasser v. United States, 315 U.S. 60, 86 L.Ed. 680, 62 S.Ct. 457 (1942) 21

Hayes v. Missouri, 120 U.S. 68, 30 L.Ed. 578, 7 S.Ct. 350 (1887) 6, 19

Johnson v. Louisiana, 406 U.S. 356, 32 L.Ed.2d 152, 92 S.Ct. 1620 (1972) 7, 13, 14

Marshall v. United States, 414 U.S. 417, 38 L.Ed.2d 618, 94 S.Ct. 700 (1974) 13

McCray v. New York, 461 U.S. 961, 77 L.Ed.2d 1322, 103 S.Ct. 2438 (1983) 7

Peters v. Kiff, 407 U.S. 493, 33 L.Ed.2d 83, 92 S.Ct. 2163 (1972) 22

Table of Authorities Cited

United States Supreme Court

	Page
Pointer v. United States, 151 U.S. 396, 38 L.Ed. 208, 14 S.Ct. 410 (1894)	6
Ross v. Moffitt, 417 U.S. 600, 41 L.Ed.2d 341, 94 S.Ct. 2437 (1974)	13
Shelley v. Kraemer, 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836 (1948)	23
Singer v. United States, 380 U.S. 24, 13 L.Ed.2d 630, 85 S.Ct. 783 (1965)	19, 20
Stilson v. United States, 250 U.S. 583, 63 L.Ed. 1154, 40 S.Ct. 28 (1919)	10
Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880)	21
Stroud v. United States, 251 U.S. 15, 64 L.Ed. 103, 40 S.Ct. 50 (1919)	6
Swain v. Alabama, 380 U.S. 202, 13 L.Ed.2d 759, 85 S.Ct. 824 (1965)	10, 22
Taylor v. Louisiana, 419 U.S. 522, 42 L.Ed.2d 690, 95 S.Ct. 692 (1975)	22
Thiel v. Southern Pacific Co., 328 U.S. 217, 90 L.Ed. 1181, 66 S.Ct. 984 (1946)	22
United States v. Marchant, 25 U.S. 480, 6 L.Ed. 700 (1827)	10
United States v. Wood, 299 U.S. 123, 81 L.Ed. 78, 57 S.Ct. 177 (1936)	10
Vasquez v. Hillery, 474 U.S. ___, 88 L.Ed.2d 598, 106 S.Ct. 617 (1986)	22
Williams v. Florida, 399 U.S. 78, 26 L.Ed.2d 446, 90 S.Ct. 1893 (1970)	11, 17, 18

TABLE OF AUTHORITIES CITED

United States Court of Appeals

Page

Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985) 8, 20

State Courts

Commonwealth v. DiMatteo, 12 Mass.App. 547, 427 N.E.2d 754 (1981) 8

Commonwealth v. Reid, 384 Mass. 247, 424 N.E.2d 495 (1981) 8

Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979) 8, 9

People v. Pagel, 186 Cal.App.3d Supp. 1, 232 Cal.Rptr. 104 (1986) 4, 17

People v. Thompson, 79 App.Div.2d 87, 435 N.Y.S.2d 739 (1981) 8

People v. Wheeler, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978) 2, 3, 5, 8, 15, 16, 17, 18

Riley v. State, 496 A.2d 997 (Del.Supr. 1985) 8

State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (1986) 8

State v. Neil, 457 So.2d 481 (Fla. 1984) 8

Constitutional Provisions

Sixth Amendment 4, 9, 11, 12

Fourteenth Amendment 1, 4, 9, 12, 23

California Constitution, Art. 1, section 16 16

TABLE OF AUTHORITIES CITED

Page

Statutes

Page

California Penal Code
§ 1069 15
§ 1070 15

Court Rules

Rule 17.1(b), United States Supreme Court Rules 9

No. 86-1085

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

HERBERT PAGEL,
Petitioner,

VS.

STATE OF CALIFORNIA,
Respondent.

(To the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, No. CR A 23539)

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to those provisions cited by petitioner (Petition 4), the following federal constitutional provision is involved in this proceeding:

The Fourteenth Amendment to the United States Constitution, to the extent that it provides:

> "No state shall . . . deprive any person of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

Facts and proceedings additional to those recited in the Petition are necessary for consideration of the issues raised by petitioner.

Petitioner states that the trial court "invited" the deputy city attorney to make a motion to dismiss the jury panel. (Petition 6.) Immediately after defense counsel Larry Mullins excused prospective juror Mitchell, Deputy City Attorney Tso asked to approach the bench. Only then did the court mention *People v. Wheeler,* 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978), and concur in the prosecutor's expressed concern over a possible misuse of peremptory challenges under that case. (RT 12/11-12/12/84, at p. 111:5-27.)

In the discussion between court and counsel which followed, Mr. Mullins made no assertion that the case of *People v. Wheeler* did not apply to restrict peremptory challenges by criminal defendants. Rather, he simply proffered justifications for challenging the three jurors, even though the trial judge stated specifically that "[b]oth sides must comply with the mandate of *People v. Wheeler.*" (RT 12/11-12/12/84, at pp. 112-114.) When Ms. Tso renewed her objection to petitioner's excusal of the potential jurors the next morning, Mr. Mullins explained his reasons for dismissing the three, but again did not contend that the application of *Wheeler* to his challenges violated any federal constitutional provisions. (RT 12/11-12/12/84, at pp. 143, 146-150.)

The trial judge, prior to making his order dismissing the jurors and quashing the venire, specifically stated the legal and factual grounds for his determination that petitioner's counsel had excused jurors based on improper grounds. The court stated that

> "Once the People have shown a prima facie case of noncompliance with the dictates of *Wheeler*[,] . . . the burden shifts to the defense, [and] the defense must present satisfactory evidence to this Court that the peremptories were exercised for specific bias. That has not been the case here.

> "With regard to the motion before the Court, the Court finds that the burden of justification that has shifted to the defense has not been sustained as to all of the questioned challenges, particularly as applied to one of the jurors, Mr. Street.
>
> "Therefore, the validity of the presumptions has been effectively and satisfactorily rebutted."

The court relied for its ruling on *People v. Wheeler* and a series of rulings by California Courts of Appeal. (RT 12/11-12/12/84, at pp. 153-154.)

On the day following the dismissal of the selected jurors and the quashing of the remaining venire, the cause was transferred to another division of the Los Angeles Municipal Court for trial. (Docket entry for 12/13/84.) During the next two court days, the parties selected jurors from a new venire of prospective jurors. Petitioner was still represented by Mr. Mullins. On December 17, petitioner accepted twelve jurors and one alternate. No objection appears on the record that petitioner's right to exercise peremptory challenges had been abridged either by the quashing of the first jury venire or by the second jury selection process. (Docket entries for 12/14 and 12/17/84.) Ultimately, the previously accepted alternate sat as a juror. The jury, after a three-day trial, found petitioner guilty as charged. (Docket entry of 12/19/84.)

ARGUMENT

A. The Constitutional Issues Raised in the Petition for Certiorari Were Neither Presented Nor Addressed in the State Courts

Petitioner states that the question presented to this Honorable Court by his petition is whether defense counsel's use of peremptory challenges may be restricted to the same extent as the prosecution's challenges were

limited in *Batson v. Kentucky,* 476 U.S. ____, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986). (Petition 2.) Respondent has posed the question differently. Regardless of the form in which the federal issue is presented, however, the fact remains that petitioner never specifically made the claim in the state court, and the Appellate Department of the Los Angeles Superior Court did not address any federal question in its Opinion. Therefore, the jurisdiction of this Court has been improperly invoked, and certiorari should be denied.

In *Cardinale v. Louisiana,* 394 U.S. 437, 438, 22 L.Ed.2d 398, 400, 89 S.Ct. 1161 (1969), this Court determined that federal issues not raised and decided in the state courts could not be addressed by the United States Supreme Court. (See also, *Beck v. Washington,* 369 U.S. 541, 550, 8 L.Ed.2d 98, 107-109, 82 S.Ct. 955 (1962).) The Statement of the Case petitioner supplies this Court and the additional facts in respondent's own statement, *supra,* reveal that at no time did petitioner's trial counsel object to the trial court placing constraints upon his peremptory challenges. He neither cited to the federal constitutional guarantees of an impartial jury trial, nor to due process or equal protection of the laws. Moreover, he did not enter an objection to the proceedings upon the ground that petitioner now takes: that the defense, because of its "time-honored right to unfettered peremptory challenges" (Petition 16), should not be subject to the same constraints as the prosecution with respect to challenges based upon race.

Furthermore, nothing in the Appellate Department's Opinion (Petition Appendix A, *People v. Pagel,* 186 Cal.App.3d Supp. 1, 232 Cal.Rptr. 104 (1986)) makes reference to any claim by petitioner before that court that the Sixth and Fourteenth Amendments precluded the state trial court from dismissing the jury panel in this

case. In fact, only passing reference appears to even *Batson v. Kentucky, supra.*[1] Nowhere in the Opinion, however, does the state appellate court decide a federal question based on *Batson.* Rather, the Opinion determines that as a matter of state law the prosecution may be allowed to question a defendant's removal of black jurors without reason. This is true, even though the Appellate Department's Opinion was filed September 25, 1986, almost five months after *Batson v. Kentucky* was decided by this Court on April 30, 1986. On this record, this Honorable Court is without jurisdiction to grant the Petition.

B. Petitioner Posed No Constitutional Objection to the Makeup of the Jury Which Heard the Evidence and Rendered the Verdict

Petitioner does not assert that he was restricted from exercising any peremptory challenges during the jury selection process of December 14 and 17, 1984, which immediately preceded his trial. Nowhere in that procedure does he claim there was a denial of his statutory right to excuse a juror without cause. In fact, in this second jury selection process petitioner accepted the regular and alternate jurors for his trial after a lengthy voir dire. That jury found appellant guilty, and it is the judgment following that conviction that petitioner appealed. Petitioner may not apply to this Court for relief from asserted errors in the initial jury selection proce-

---

[1] *Batson* was cited in footnote 1 of the Opinion (Petition A-6 to A-7, 186 Cal.App.3d at Supp. 6, 232 Cal.Rptr. at 107) to suggest that this Court, if it were to decide whether the defense was subject to the restrictions announced in that case and in *People v. Wheeler, supra,* would consider wide-ranging public policy issues such as the community effect of racially-based exclusion of jurors. This generalized reference to the *Batson* case clearly does not constitute a decision on the federal questions petitioner now presents.

dure. This is true because petitioner was tried in an error-free trial by a jury to which he raised no objection.

In *Hayes v. Missouri,* 120 U.S. 68, 30 L.Ed. 578, 4 S.Ct. 350 (1887), the plaintiff in error had been convicted of murder in a state court in the city of St. Louis. He asserted error in this Court, claiming that his right to equal protection had been denied by a Missouri law which at that time allowed the prosecutor fifteen peremptory challenges in cities exceeding 100,000 inhabitants, but only eight such challenges elsewhere in the state. In Hayes' trial, the state had used all 15 challenges permitted to it. This Court affirmed. In so doing, it stated:

> "In this country the power of the Legislature of a State to prescribe the number of peremptory challenges is limited only by the necessity of having an impartial jury.... The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more.... In this case, it is not even suggested that the jury by which the accused was tried was not a competent and impartial one." (*Id.,* 120 U.S. at 71, 30 L.Ed. at 580, 7 S.Ct. 350.)

(See also *Frazier v. United States,* 335 U.S. 497, 504, 508, 93 L.Ed. 187, 194-196, 69 S.Ct. 201 (1948); *Stroud v. United States,* 251 U.S. 15, 20-21, 64 L.Ed. 103, 111, 40 S.Ct. 50 (1919); *Pointer v. United States,* 151 U.S. 396, 412, 38 L.Ed. 208, 215, 14 S.Ct. 410 (1894).)

On the basis of the authority above and since no proper objection was made to the constitution of the jury panel that actually tried him, petitioner cannot now complain of any error of the trial court during the original jury selection process which that court terminated by a quashal of the petit jury venire.

C. The Appellate Department's Holding Restricting Petitioner's Peremptory Challenges Is Consistent with Federal and State Authority on that Developing Issue

In his opinion respecting the denial of the petitions for writs of certiorari in *McCray v. New York,* 461 U.S. 961, 77 L.Ed.2d 1322, 103 S.Ct. 2438 (1983), Justice Stevens, joined by Justices Powell and Blackmun, stated that the issue of whether the Constitution prohibits a prosecutor's use of peremptory challenges to exclude from a jury members of a particular group was not ready to be addressed by this Court. Justice Stevens pointed to the absence of the conflict of decision within the federal system and the developing litigation on the issue in the state courts. He concluded:

> "In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court." (*Id.,* 461 U.S. 961, 77 L.Ed.2d at 1323, 103 S.Ct. 2438.)

The issue was, of course, finally addressed in *Batson v. Kentucky* after the Kentucky Supreme Court curtly disposed of the authority developing against a prosecutor's use of race-based peremptory challenges "in a single paragraph." (*Batson v. Kentucky, supra,* 476 U.S. at ____, 90 L.Ed.2d at 79, 106 S.Ct. 1712.)

Respondent submits that the issue of the appropriate restriction of a criminal defendant's peremptory challenges presented in this case stands as the *"Batson"* issue did in 1983, *i.e.,* further treatment of the issue in the nation's lower courts is warranted. (See also *Johnson v. Louisiana,* 406 U.S. 356, 376, 32 L.Ed.2d 152, 167-168, 92 S.Ct. 1620 (1972) (Powell, J., concurring).) In the first place, as Chief Justice Burger noted in his dissent in

Batson v. Kentucky, which was joined by Justice Rehnquist:

> " 'Every jurisdiction which has spoken to the matter, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation, has held that the defense must likewise be so prohibited.' [Citation.]" (*Batson v. Kentucky, supra,* 476 U.S. at ____, fn. 6, 90 L.Ed.2d at 107, 106 S.Ct. 1712.)

Indeed, the federal and state courts are united on the question. (*Booker v. Jabe,* 775 F.2d 762, 772 (6th Cir. 1985), vacated and remanded for reconsideration, ____ U.S. ____, 92 L.Ed.2d 705, 106 S.Ct. 3289 (1986), reinstated on remand, 801 F.2d 871 (1986); *People v. Wheeler, supra,* 22 Cal.3d at 282, fn. 29, 148 Cal.Rptr. at 906-907, 583 P.2d 748; *State v. Neil,* 457 So.2d 481, 487 (Fla. 1984); *Commonwealth v. Soares,* 377 Mass. 461, 387 N.E.2d 499, 517, n. 35 (1979); *Commonwealth v. Reid,* 384 Mass. 247, 424 N.E.2d 495, 498-501 (1981); *Commonwealth v. DiMatteo,* 12 Mass.App. 547, 427 N.E.2d 754, 757-758 (1981).) Moreover, at least three other state jurisdictions, while not specifically deciding the issue, have suggested that the defense is also subject to restrictions on challenges based on race. (*Riley v. State,* 496 A.2d 997, 1011 (Del.Supr. 1985), cert. den. *sub nom. Riley v. Delaware,* ____ U.S. ____, 92 L.Ed.2d 743, 106 S.Ct. 3339 (1986) [referring to "a *party*'s exercise of peremptory challenges"], *State v. Gilmore,* 103 N.J. 508, 511 A.2d 1150, 1163, n. 6 (1986) [realizing a distinction between defense challenges of minority and majority racial groups]; *People v. Thompson,* 79 App.Div.2d 87, 435 N.Y.S.2d 739, 752 (1981) [speaking of the availability of the peremptory to "a *party*"].)

The opinions and dicta of the state and federal courts are consistent. In addition, they are for the most part

founded on the principle that the government as well as the defendant in a criminal case is entitled to a fair trial. (See, *e.g., Commonwealth v. Soares, supra*, 377 Mass. 461, 387 N.E.2d 499.) As respondent demonstrates in its remaining argument, that basis, in addition to others, justifies the restriction placed on petitioner's peremptory challenges in this case. Therefore, there appears no need for this Court to review the decision of the Appellate Department, since it is "in line" with the carefully considered case law which has developed nationwide on the issue. (Cf. Rule 17.1(b), United States Supreme Court Rules.)

D. The State Trial Court Restriction Upon the Exercise of Petitioner's Peremptory Challenges Was Not Violative of the Sixth or Fourteenth Amendments

Petitioner asserts a "time-honored" right to unallayed peremptory challenges and contends that his Sixth Amendment right to an impartial jury trial and the equal protection of the laws as guaranteed by the Fourteenth Amendment were violated by virtue of the restraints placed upon his peremptory challenges. (Petition 4, 16.) Petitioner's argument that the Sixth and Fourteenth Amendments ensure him unfettered peremptory challenges is without basis. The right to exercise such challenges is not constitutionally mandated; rather, it is state-created. The limitation on the challenges allowed by the state trial and appellate courts did not violate his rights to jury trial, due process or equal protection. Respecting the equal protection argument, petitioner was simply not denied any right extended to persons similarly situated. The state's restriction on petitioner's challenges did not violate due process or the Sixth Amendment because it did not affect the function of the jury as an impartial trier of fact; moreover, there exist compelling justifications for the limitation.

1. States Need Not Allow Defense Peremptory Challenges. Once a State Permits Such Challenges, It May Restrict Them in Any Reasonable Manner

"The right of peremptory challenge is . . . a right to reject jurors." (*United States v. Marchant*, 25 U.S. 480, 482, 6 L.Ed. 700 (1827).) There can be no doubt in this case that the state trial court restricted petitioner's right to reject three black jurors and therefore limited the exercise of his peremptory challenge. Nevertheless, that limitation did not result in any incursion upon his constitutional rights.

The procedural details of the jury system are for the states to control and develop. This Court has established that

> " 'there is nothing in the Constitution of the United States which requires the Congress or the States grant peremptory challenges[.]' " (*Swain v. Alabama*, 380 U.S. 202, 219, 13 L.Ed.2d 759, 772, 85 S.Ct. 824 (1965); see also *Batson v. Kentucky, supra*, 476 U.S. at ____, 90 L.Ed.2d at 84, 106 S.Ct. 1712.)

As stated in *United States v. Wood*, 299 U.S. 123, at 145-146, 81 L.Ed. 78, at 88, 57 S.Ct. 177 (1936) (citing *Stilson v. United States*, 250 U.S. 583, 586, 63 L.Ed. 1154, 1156, 40 S.Ct. 28 (1919)),

> " '[T]rial by an impartial jury is all that is secured.'
>
> * * *
>
> ". . . [T]he mode of procuring and impanelling such jury is regulated by law, either common or statutory. . . ."

(See also, *Swain v. Alabama, supra,* 380 U.S. at 244, 13 L.Ed.2d at 786, 85 S.Ct. 824 (Goldberg, J., dissenting).)

Petitioner contends that his Sixth Amendment guarantee of an impartial jury trial was violated by the trial court's actions. To the contrary, the Sixth Amendment does not dictate to the states precise procedures to follow to warrant against abridgement of this right. Furthermore, the practice petitioner advocates would frustrate, not encourage, the formation of impartial juries.

It is essential to investigate *Williams v. Florida*, 399 U.S. 78, 26 L.Ed.2d 446, 90 S.Ct. 1893 (1970), in this regard. In *Williams*, this Court decided that the Sixth Amendment right to jury trial did not require a state to present criminal defendants with a trial by exactly 12 persons. The Court upheld a Florida law which provided for a six-man jury in all but capital cases.

> "Legislatures may well have their own views about the relative value of the larger and smaller juries .... Our holding does no more than leave these considerations to the Congress and the States, unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that can constitute a jury." (*Williams v. Florida, supra,* 399 U.S. at 103, 26 L.Ed.2d at 462, 90 S.Ct. 1893.)

Thus, the Court responded to Florida's limitation on the numbers in a petit jury panel by allowing the restriction, despite the tradition of the 12-man jury. To determine whether the Sixth Amendment commands a particular procedure, this Court stated,

> "[t]he relevant inquiry ... must be the function that the particular feature performs and its relation to the purposes of the jury trial." (*Id.,* 399 U.S. at 99-100, 26 L.Ed.2d at 460, 90 S.Ct. 1893.)

Viewed in this light, petitioner's interpretation of the scope of the Sixth Amendment is clearly flawed.

> "[T]he essential feature of a jury trial obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." (*Id.*, 399 U.S. at 100, 26 L.Ed.2d at 460, 90 S.Ct. 1893.)

Absolute freedom to discharge blacks from a petit jury simply because they are black would not serve this purpose. Instead, it would negate community participation and work strongly against providing a common sense judgment in jury verdicts by the promotion of group bias. (See *Batson v. Kentucky, supra*, 476 U.S. at ____, 90 L.Ed.2d at 81-82, 106 S.Ct. 1712.) Unrestricted defense peremptory challenges would perform a function that would hinder, not help, the realization of a fair and proper jury trial. Clearly no Sixth Amendment violation appears from the limitation imposed by the state courts.

Petitioner's assertion that he was denied equal protection of the laws is also without merit. State action under the Fourteenth Amendment

> "is not open to the objection that it denies . . . equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions." (*Missouri Pacific Railway Co. v. Mackey*, 127 U.S. 205, 209, 32 L.Ed. 107, 109, 8 S.Ct. 1161 (1888).)

(See also *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 84, 90 L.Ed. 1096, 1098-1099, 66 S.Ct. 850 (1945); *Prince v. Massachusetts*, 321 U.S. 158, 170-171, 88 L.Ed. 645, 655, 64 S.Ct. 438 (1943).) Here petitioner has not shown that the California restriction on his peremptory challenges resulted in treatment of him which was different from that received by any other criminal defendant. Thus, he

has failed completely to establish a claim of denial of equal protection of the laws.

Likewise, the restraints placed upon petitioner's peremptory challenges did not deny him due process.[2] In the companion cases of *Johnson v. Louisiana, supra*, 406 U.S. 356, 32 L.Ed.2d 152, 92 S.Ct. 1620, and *Apodaca v. Oregon, supra,* 406 U.S. 404, 32 L.Ed.2d 184, 92 S.Ct. 1628, this Court held constitutional state laws which allowed criminal convictions based upon verdicts of guilty by non-unanimous juries. Again, the decisions stressed the state's control of criminal procedure.

In *Johnson* the appellant was charged with robbery, an offense necessarily punished by hard labor. Louisiana law required the guilty votes of nine of twelve jurors to convict a defendant of such a crime. The state demanded unanimity only in trials of capital crimes attended by 12-man juries and in trials by five-man juries for crimes where the penalty of hard labor was merely permissive. The appellant complained that because he had been convicted by a verdict of nine to three, he had been denied due process and equal protection of the laws. This Court

---

[2]Petitioner does not specifically raise the argument that the constraints upon his peremptory challenges violated the Fourteenth Amendment's Due Process Clause. However, respondent has chosen to discuss the application of the tenets of due process for two reasons: first, a due process analysis has been utilized in cases decided by this Court involving the states' extension or denial of privileges in criminal proceedings. *Ross v. Moffitt*, 417 U.S. 600, 608-612, 41 L.Ed.2d 341, 350-351, 94 S.Ct. 2437 (1974); *Marshall v. United States,* 414 U.S. 417, 428-430, 38 L.Ed.2d 618, 627-628, 94 S.Ct. 700 (1974); *Apodaca v. Oregon*, 406 U.S. 404, 32 L.Ed.2d 184, 92 S.Ct. 1628 (1972); *Douglas v. California,* 372 U.S. 353, 357, 9 L.Ed.2d 811, 814, 83 S.Ct. 811, 814, 83 S.Ct. 814 (1963).) Second, a due process discussion thoroughly exposes petitioner's contentions as inconsistent with the proper role of the jury in this pluralistic society.

rejected his claims. With regard to the due process issue, the Court declared:

> "[I]t is our view that the fact of three dissenting votes to acquit raises no question of constitutional substance about either the integrity or the accuracy of the majority verdict of guilt." (*Id.*, 406 U.S. at 360, 32 L.Ed.2d at 158, 92 S.Ct. 1620.)

In *Apodaca v. Oregon, supra*, Justice White further explained the due process holding:

> "A requirement of unanimity, however, does not materially contribute to the exercise of ... common sense judgment. As we said in *Williams*, a jury will come to such a judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt." (*Id.*, 406 U.S. at 410-411, 32 L.Ed.2d at 191, 92 S.Ct. 1628.)

The use of the peremptory challenge advocated by petitioner, which would allow control of the racial makeup of a jury to pass into a defendant's hands, does not contribute at all to the function of the jury as described in *Apodaca v. Oregon, supra.* Peremptories based upon race would surely jeopardize cross-sectional representation in juries. Indeed, since "[n]o group ... has the right to block convictions" (*Id.*, 406 U.S. at 413, 32 L.Ed.2d at 193, 92 S.Ct. 1628), uncontrolled use of peremptory challenges would clearly work against the fulfillment of the jury's designated role.

The classifications created by the states in *Johnson* and *Apodaca* served merely "to 'facilitate, expedite, and reduce expense in the administration of justice.' " (*Johnson v. Louisiana, supra,* 406 U.S. at 364, 32 L.Ed.2d at 160, 92

S.Ct. 1620.) In this case, the denial of petitioner's challenges, as respondent demonstrates, *infra*, is based on far more fundamental and honored grounds, namely the preservation of the state's right to a fair trial and the guarantee of access to the criminal justice system to persons of all races. Given this necessary basis for the restriction on petitioner's statutory rights, he can hardly complain of a denial of due process.

Just as in the cases above, the State of California in this case asserted control of its jury selection process in a proper manner. The California Supreme Court in *People v. Wheeler, supra,* and the Appellate Department in this case grounded their holdings upon California statutory and constitutional provisions. The state thus assumed the authority over the type of peremptory challenges exercised by petitioner. That control, under the standards set forth in this Court's cases cited above, did not infringe upon any provision of the United States Constitution.

State of California Penal Code section 1069 provides:

> "A peremptory challenge can be taken by either party, and may be oral. It is an objection to a juror for which no reason need be given, but upon which the Court must exclude him." (West's Ann. Cal. Penal Code § 1069.)

Penal Code section 1070, subdivision (a), allows the defendant and the state each 10 peremptory challenges in trials of offenses other than those punishable with death or life imprisonment. (*Id.,* § 1070.)

In *People v. Wheeler, supra,* 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748, the California Supreme Court construed section 1069:

> "It is true that the statute defines such a challenge as one for which 'no reason need be given'; *but it does not follow therefrom that it is an objection for which no*

> *reason need exist.*" (*Id.*, 22 Cal.3d at 274, 148 Cal.Rptr. at 901, 583 P.2d 748, partial emphasis in the opinion.)

From that construction, the court proceeded to determine that Article 1, section 16, of the California Constitution,[3] which implicitly guaranteed a trial by an impartial jury, was violated by the use of peremptory challenges to remove prospective jurors on the sole ground of group bias. (22 Cal.3d at 265, 276-277, 148 Cal.Rptr. at 895, 903, 538 P.2d 748.) The *Wheeler* court stated clearly the scope of its decision in footnote 29, 22 Cal.3d at 282, 148 Cal.Rptr. at 906-907, 538 P.2d 748:

> "[T]he Attorney General has [the] right [to object to same misuse of peremptory challenges on the part of defense counsel] *under the constitutional theory we adopt herein*: the People no less than individual defendants are entitled to a trial by an impartial jury drawn from a representative cross-section of the community. Furthermore, to hold to the contrary would frustrate other essential functions served by the requirement of cross-sectionalism. . . . For example, when a white defendant is charged with a crime against a black victim, the black community as a whole has a legitimate interest in participating in the trial proceedings; that interest will be defeated if the prosecutor does not have the power to thwart any defense attempt to strike all blacks from the jury on the basis of group bias alone." (Emphasis added.)

The Appellate Department's Opinion in this case adopted the above statement in *Wheeler* as the rationale for its decision. (Petition A-8, 186 Cal.App.3d at Supp. 7, 232

---

[3]Article 1, section 16, provides in relevant part:

> "Trial by jury is an inviolate right and shall be secured to all. . . ."

Cal.Rptr. at 107-108.) Thus, the restriction upon defense peremptory challenges in the *Wheeler* and *Pagel* cases is firmly set in the statutory, constitutional and common law of the State of California.

As demonstrated above, the restriction is manifestly not violative of the federal Constitution. Moreover, this Court's decisions and the opinions of individual justices through *Batson v. Kentucky* express the rationales for the restriction applied to peremptory challenges in this case. Indeed, *People v. Wheeler* examined this Court's opinions to explain the policy behind its interpretation of the California statutes and constitution. (22 Cal.3d at 267-270, 148 Cal.Rptr. at 896-898, 583 P.2d 748.) When viewed in the light of the applicable principles evoked by this Court, which respondent discusses below, clearly the restriction of the race-based excusal of jurors by the defense in this case was a proper activity of the state courts.

2. Petitioner Had No Constitutional Right to a Petit Jury Panel From Which Blacks Were Excluded

The restriction imposed upon petitioner's selection of jurors in this case was proper, because he had no constitutionally justified expectation of a jury from which blacks were excluded. Given the total lack of even a colorable argument to the contrary, no review of the Appellate Department's holding should be granted. As this Court stated in *Batson v. Kentucky:*

> "[A] defendant has no right to a 'petit jury composed in whole or in part of persons of his own race.' [Citation]" (*Id.*, 476 U.S. at ____, 90 L.Ed.2d at 80, 106 S.Ct. 1712).

Furthermore, as the opinion in *Williams v. Florida, supra,* observed,

> "Even the 12-man jury cannot insure representation of every distinct voice in the community, particularly given the use of the peremptory challenge. As long as arbitrary exclusions of a particular class from the jury rolls are forbidden [citation], the concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one." (*Id.*, 399 U.S. at 102, 26 L.Ed.2d at 461, 90 S.Ct. 1893.)

(See also *Apodaca v. Oregon, supra,* 406 U.S. at 412-413, 32 L.Ed.2d at 192-193, 92 S.Ct. 1628.) Although *Batson* has expanded the exception stated in *Williams, supra,* to include "arbitrary exclusions" from a petit jury, the lesson from these cases remains intact. A criminal defendant can neither expect nor demand a jury composed of persons who will favor him on racial grounds. He only has a right to "a jury whose members are selected pursuant to nondiscriminatory ~~criteria~~." (*Batson v. Kentucky, supra,* 476 U.S. at ____, 90 L.Ed.2d at 80, 106 S.Ct. 1712.) Petitioner, however, does not claim to have been deprived of that right. What petitioner claims is the "time-honored right to unfettered peremptory challenges." (Petition 16.)

Petitioner's argument really amounts to a contention that whenever a defendant has the opportunity to obtain a biased jury by eliminating jurors because of their race alone, he may constitutionally avail himself of that opportunity. the Constitution, however, does not afford such a right to petitioner, as the above-cited cases demonstrate. A defendant in a criminal trial has only the right to be tried by an impartial jury from which racial groups have *not* been excluded without cause. Since petitioner makes no argument that such a trial did not occur, the Petition should not be granted.

3. The State of California Was Entitled to a Fair Trial before Impartial Jurors

A further reason exists why the Petition in this case should not be granted. In view of the state's interest in a fair trial, no unwarranted restriction upon petitioner's peremptory challenges took place. In matters relating to selection of a jury, the government has an equal stake with the defendant in the impanelment of an impartial jury. The principle was established as early as *Hayes v. Missouri, supra*:

> "It is to be remembered that such impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." (*Id.*, 120 U.S. at 70, 38 L.Ed. at 579-580, 7 S.Ct. 350.)

(See also *Batson v. Kentucky, supra*, 476 U.S. at ____, 90 L.Ed.2d at 94-95, 106 S.Ct. 1712, (Marshall, J., concurring [citing *Hayes* and stating that since "[t]he potential for racial prejudice . . . inheres in the defendant's challenge as well . . . only by banning peremptories entirely can such discrimination be ended."]; 476 U.S. at ____, 90 L.Ed.2d at 107, 106 S.Ct. 1712 (Burger, C.J., dissenting).

> "The function of the [peremptory] challenge is not only to eliminate extremes of partiality *on both sides,* but to assure *the parties* that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." (*Swain v. Alabama, supra,* 380 U.S. at 219, 13 L.Ed.2d at 759, 85 S.Ct. 824, emphasis added.)

In an analogous situation, this Court held in *Singer v. United States,* 380 U.S. 24, 13 L.Ed.2d 630, 85 S.Ct. 783 (1965), that the Federal Rules of Criminal Procedure could constitutionally require the consent of the prosecu-

tion and the court to a defendant's waiver of a trial by jury.

> "The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result." (*Id.*, 380 U.S. at 36, 13 L.Ed.2d at 638, 85 S.Ct. 783.)

Allowing absolute freedom for the defense in the jury selection process, as desired by petitioner, would undermine the state's interest in a fair trial acknowledged by the authority cited above. When a defense attorney avails himself of a jury composed of persons of the defendant's own race, the state cannot be assured of a panel from which the extremes of partiality have been eliminated. When a defendant effectively seeks jurors prejudiced against his prosecution by excusing blacks solely on the basis of their race, the process no longer serves its purpose to locate impartial jurors.

> "The spectacle of a defense counsel systematically excusing potential jurrors because of their race . . . while the prosecutor and trial judge were constrained merely to observe, could only impair the public's confidence in the integrity and impartiality of the resulting jury." (*Booker v. Jabe, supra,* 775 F.2d at 772.)

Because the limitation by the California courts upon petitioner's peremptory challenges furthers this state interest, it is an eminently justifiable restriction. The ruling of the Appellate Department of the Los Angeles Superior Court should be allowed to stand.

4. All Citizens, Regardless of Race, Must Be Allowed to Participate in Jury Deliberations in Criminal Cases

Additionally, the state appellate court's decision in this case should not be subject to a writ of certiorari, because the ruling of the Superior Court was correct in determining that unabated peremptory challenges by defense counsel in criminal cases would stifle the participation in the jury system of all racial groups in our society. In the statement which the Appellate Department cited (Petition A-7, 186 Cal.App.3d at Supp. 6, n. 1, 232 Cal.Rptr. at 107), Justice Powell wrote in *Batson:*

> "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. [Citation.] Discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to black citizens that equal justice which the law aims to secure to all others.' " (*Batson v. Kentucky, supra,* 476 U.S. at ____, 90 L.Ed.2d at 81-82, 106 S.Ct. 1712, citing *Strauder v. West Virginia,* 100 U.S. 303, 308, 25 L.Ed. 664, 666 (1880).)

Other pronouncements of this Court are no less forceful.

> "[T]he proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community, and not the organ of any special group or class." (*Glasser v. United States,* 315 U.S. 60, 86, 86 L.Ed. 680, 707, 62 S.Ct. 457 (1942).)
>
> "When any large and identifiable segment of the community is excluded from jury service, the effect is

> to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." (*Peters v. Kiff,* 407 U.S. 493, 503-504, 33 L.Ed.2d 83, 94, 92 S.Ct. 2163 (1972), fn. omitted.)

(See also *Vasquez v. Hillery,* 474 U.S. ____, 88 L.Ed.2d 598, 607-608, 106 S.Ct. 617 (1986); *Taylor v. Louisiana,* 419 U.S. 522, 530, 42 L.Ed.2d 690, 698, 95 S.Ct. 692 (1975); *Ballard v. United States,* 329 U.S. 187, 193-194, 195, 91 L.Ed. 181, 186-187, 67 S.Ct. 261 (1946); *Thiel v. Southern Pacific Co.,* 328 U.S. 217, 220, 90 L.Ed. 1181, 1185, 66 S.Ct. 984 (1946).)

Petitioner dismisses these vastly important ideals of our system of justice as "general societal goals" of "very limited benefit." (Petition 16.) In contrast stands Justice O'Connor's statement concurring in the denial of certiorari in *Brown v. North Carolina,* 479 U.S. ____, 93 L.Ed.2d 373, 374, 107 S.Ct. 423 (1986):

> "*Batson,* in my view, depends upon this Nation's profound commitment to the ideal of racial equality, a commitment that refuses to permit the State to act on the premise that racial differences matter. It is central to *Batson* that a 'person's race simply "is unrelated to his fitness as a juror" ' *Id.,* at ____, 90 L.Ed.2d 69, 106 S.Ct. 1712 (citation omitted)."[4]

---

[4]The dissenting opinion in *Swain v. Alabama, supra,* deplored the use of the judicial system to perpetuate racial discrimination. According to Justice Goldberg, the record established "[t]he State's agreement with the defense . . . to remove Negroes from jury

The restriction in this case upon petitioner's peremptory challenges furthers the commitment against racial distinctions expressed by this Court and therefore is constitutionally justified. Based on the solid underpinning of the restriction, there is no need to reexamine the decision of the Appellate Department in this case.

CONCLUSION

Petitioner has unabashedly asked this Court to allow removal of jurors on the basis of race. However, the Appellate Department's Opinion stands firmly upon California law which withstands constitutional scrutiny and upon principles which this Court has vigorously maintained. The holding is consistent with that of other appellate courts. Certiorari should not be granted in this case.

Respectfully submitted,

JAMES K. HAHN,
City Attorney of Los Angeles
WILLIAM N. STERLING,
Deputy City Attorney
LAURENCE WAYNE MOONEY
Deputy City Attorney
and
Counsel of Record

Attorneys for Respondent
State of California

---

venires." (*Id.*, 380 U.S. at 234-235, and n. 2, 13 L.Ed.2d at 781, 85 S.Ct. 824.) This joint participation by state officials constituted state action under the Fourteenth Amendment (*Ibid.*) If the prosecutor and the trial judge in this case had permitted petitioner's defense counsel to blatantly remove jurors solely because of their race, the State of California would have been as deeply involved in discrimination. (*Shelley v. Kraemer*, 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836 (1948).)

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On March 31, 1987, I served the within Brief in Opposition to Petition for Writ of Certiorari in re: "Herbert Pagel vs State of California" in the United States Supreme Court, October Term 1986, No. 86-1085;

on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
#1 First Street N.E.
Washington, D.C. 20543
(Original and forty copies)

Edward J. Horowitz,
Attorney at Law
11661 San Vicente Blvd.,
Suite 1015
Los Angeles, CA 90049

Clerk, Appellate Dept. of the
Superior Court
Department 70
111 North Hill Street
Los Angeles, CA 90012 (1)

Honorable Larry Fidler
Criminal Courts Building
210 West Temple Street
Los Angeles, CA 90012 (1)

Honorable Michael E. Pastor
Criminal Courts Building
210 West Temple Street
Los Angeles, CA 90012 (1)

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on March 31, 1987, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

Supreme Court, U.S.
FILED
APR 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1085

In the Supreme Court of the United States

October Term, 1986

HERBERT PAGEL,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Defendant.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

(APPELLATE DEPARTMENT OF THE SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, NO. CR A 23539)

EDWARD J. HOROWITZ
A Professional Corporation
11661 San Vicente Boulevard
Suite 1015
Los Angeles, California 90049
Telephone: (213) 826-6619
Attorney for Petitioner
HERBERT PAGEL

Westside Law Publishers Los Angeles, California (213) 477-0491

QUESTION PRESENTED

Do the restrictions on a prosecutor's use of peremptory challenges, recently established by this Honorable Court in *Batson v. Kentucky*, (1986) 476 U.S. ___, 90 L.Ed.2d 69, 106 S.Ct. 1712, also apply to defense counsel? This issue was specifically reserved in footnote 12 of the *Batson* opinion.

TOPICAL INDEX

Page

Question Presented i

Introduction 1

Legal Discussion

I.

Petitioner Relied On Federal Constitutional And Decisional Authorities In The California Appellate Court. Conversely, Neither Respondent Nor The California Appellate Court Relied On Petitioner's Failure To Expressly Cite Such Authorities In The Trial Court 3

II.

The Seminal California Case Of *People v. Wheeler* Relies Extensively On Federal Authorities 4

III.

Petitioner Was Not Required To Make A Redundant And Futile Objection To The New Jury. If That Jury Was Selected Under Incorrect Restrictions On Petitioner's Exercise Of Peremptory Challenges, The Error Was Prejudicial Per Se 6

IV.

The Issue Presented Here Is Current, Important And Ripe For Adjudication 7

Conclusion 8

TABLE OF AUTHORITIES CITED

Cases **Page**

Ballard v. United States (1946) 329 U.S. 187, 91 L.Ed. 181, 67 S.Ct. 261 ..... 5, 7
Batson v. Kentucky, (1986) 476 U.S. ___, 90 L.Ed.2d 69, 106 S.Ct. 1712 ..... passim
Booker v. Jabe (6th Cir. 1985) 775 F.2d 762 3
Duncan v. Louisiana (1968) 391 U.S. 145 3
Glasser v. United States (1942) 315 U.S. 60, 86 L.Ed. 680, 62 S.Ct. 457 5
Griffin v. Illinois (1956) 351 U.S. 12, 76 S.Ct. 585 6
People v. Pagel (1986) 186 Cal.App.3d Supp. 1, 232 Cal.Rptr. 104 ..... 3, 5
People v. Trevino (1985) 39 Cal.3d 667, 217 Cal.Rptr. 652, 704 P.2d 719 5
People v. Turner (1986) 42 Cal.3d 711 7
People v. Wheeler (1978) 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 ..... 4, 5, 6-7
Peters v. Kiff (1971) 407 U.S. 493 ..... 3, 5
Smith v. Texas (1940) 311 U.S. 128, 85 L.Ed. 84, 61 S.Ct. 164 5
Taylor v. Louisiana (1975) 419 U.S. 522 ..... 3, 5
Thiel v. Southern Pacific Co. (1946) 328 U.S. 217, 90 L.Ed. 1181, 66 S.Ct. 984 5
Vasquez v. Hillery (1986) ___ U.S. ___, 88 L.Ed.2d 598, 106 S.Ct. 617 7

Rules

Supreme Court Rules
Rule 17.1 7
Rule 22.5 ..... 1, 7
Rule 25.2 7
Rule 25.3 7

Constitutions

United States Constitution
Sixth Amendment 3
Fourteenth Amendment 3

No. 86-1085

In the Supreme Court of the United States

October Term, 1986

HERBERT PAGEL,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The petition here presents the issue reserved by footnote 12 of *Batson v. Kentucky, supra,* 476 U.S. ___, 90 L.Ed.2d 69, 106 S.Ct. 1712, i.e., whether the restrictions on a prosecutor's use of peremptory challenges also apply to defense counsel. Respondent's opposition to the petition discusses the merits of the above issue and presents two new arguments which this reply shall address pursuant to this Court's Rule 22.5. Respondent's new points are as follows:

1. "The constitutional issues raised in the Petition for Certiorari were neither presented nor addressed in the state courts" [Opp., pp. 3-5];

2. "Petitioner posed no constitutional objection to the makeup of the jury which heard the evidence and rendered the verdict" [Opp., pp. 5-6].

In effect, respondent contends the issue raised by the petition was not sufficiently preserved below. As discussed *infra*, respondent is wrong in several respects and, in addition, seeks an unfair benefit from the fact that *Batson* was not rendered until *after* trial in this matter and *after* the appeal had been fully briefed in the California appellate court. In fact, however, the issue presented here was properly presented to the California appellate court by references to federal constitutional and decisional authorities. Further, neither respondent nor the California appellate court made any reference to trial counsel's alleged failure to properly object at trial. Instead, the California appellate court decided the issue on its merits and even addressed the effect of *Batson*, after that decision had been called to its attention at oral argument.

In summary, it is now appropriate for this Honorable Court to address the issue reserved in *Batson*. The present case is an ideal vehicle for doing so.

LEGAL DISCUSSION

I.

PETITIONER RELIED ON FEDERAL CONSTITUTIONAL AND DECISIONAL AUTHORITIES IN THE CALIFORNIA APPELLATE COURT. CONVERSELY, NEITHER RESPONDENT NOR THE CALIFORNIA APPELLATE COURT RELIED ON PETITIONER'S FAILURE TO EXPRESSLY CITE SUCH AUTHORITIES IN THE TRIAL COURT.

In his Appellant's Opening Brief in the California appellate court, petitioner relied upon the Federal Constitution, including the Sixth Amendment, and upon various decisions of this Honorable Court, including *Peters v. Kiff* (1971) 407 U.S. 493, 500, and *Taylor v. Louisiana* (1975) 419 U.S. 522, 530, which discuss exclusion of classes of persons from jury service in terms of a defendant's rights only. (See App. Op. Br., pp. 1, 5, 10.)

At oral argument, petitioner's counsel again relied on such authorities and also called the court's attention to the then recent *Batson* decision, including footnote 12, which reserved the issue presented by the instant case.

The California appellate court discussed *Batson* in footnote 1 of its opinion. (See *People v. Pagel* (1986) 186 Cal.App.3d Supp. 1, 6, 232 Cal.Rptr. 104.) In the same footnote, the opinion also cited *Duncan v. Louisiana* (1968) 391 U.S. 145, 149, concerning the Sixth Amendment's application to the states through the Fourteenth Amendment.

Even respondent cited federal authority in its brief, i.e., *Booker v. Jabe* (6th Cir. 1985) 775 F.2d 762, 772, for the proposition that discrimination on the basis of

group affiliation in the use of peremptory challenges by either the prosecution or the defense should be improper. (Resp. Br., pp. 9-10.)

Furthermore, as discussed below in Argument II, the seminal California case, *People v. Wheeler* (1978) 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748, relied extensively on federal authorities.

Finally, trial counsel here could not cite any United States Supreme Court authority on the present issue because such authority did not exist at that time. Trial was conducted in December 1984. *Batson* was not decided until April 30, 1986, well after trial *and* after all briefing had been submitted on the appeal.

Thus, petitioner clearly and adequately preserved the issue now presented to this Honorable Court.[1]

II.

THE SEMINAL CALIFORNIA CASE OF *PEOPLE v. WHEELER* RELIES EXTENSIVELY ON FEDERAL AUTHORITIES.

In *People v. Wheeler, supra,* 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748, the California Supreme Court held that a prosecutor may not use peremptory challenges to strike jurors on the ground of group bias alone. The holding was based on both the Federal and California Constitutions. (See 22 Cal.3d at 265, 270.) *Wheeler* traced "a series of decisions beginning almost four decades ago [in which] the United States Supreme

---

[1]Interestingly, *Batson* involved a much more incomplete preservation of the issue ultimately decided there than exists here. (See concurring opinion of Justice Stevens and dissenting opinion of Chief Justice Burger.)

Court has held that an essential prerequisite to an impartial jury is that it be drawn from 'a representative cross-section of the community.' " (22 Cal.3d at 266.) *Wheeler* proceeded to discuss the following United States Supreme Court decisions: *Smith v. Texas* (1940) 311 U.S. 128, 85 L.Ed. 84, 61 S.Ct. 164; *Glasser v. United States* (1942) 315 U.S. 60, 86 L.Ed. 680, 62 S.Ct. 457; *Thiel v. Southern Pacific Co.* (1946) 328 U.S. 217, 90 L.Ed. 1181, 66 S.Ct. 984; *Ballard v. United States* (1946) 329 U.S. 187, 91 L.Ed. 181, 67 S.Ct. 261; *Peters v. Kiff, supra,* 407 U.S. 493, 33 L.Ed.2d 83, 92 S.Ct. 2163; and *Taylor v. Louisiana, supra,* 419 U.S. 522, 42 L.Ed.2d 690, 95 S.Ct. 692. (See 22 Cal.3d at 267-270.)

Thus, if *Wheeler* is deemed to have decided the issue presented in this petition, it is clear it did so in substantial part on the basis of the Federal Constitution and United States Supreme Court decisions.[2]

Further, there can be no doubt that if this Honorable Court holds the Federal Constitution provides a defendant with the right to unrestricted use of peremptory challenges, neither California nor any other

[2]One of the issues litigated in the present case was whether footnote 29 of *Wheeler* constituted a holding that defense counsel are controlled by the same rule that *Wheeler* applied to prosecutors. If so, the lower California appellate court was bound to rule against petitioner here. (See *People v. Pagel, supra,* 186 Cal.App.3d Supp. 1, 7.) Petitioner argued the *Wheeler* footnote was dicta and relied upon a later decision, *People v. Trevino* (1985) 39 Cal.3d 667, 679, 217 Cal.Rptr. 652, 704 P.2d 719, in which the California Supreme Court stated: "In *Wheeler* we *suggested* that the People also have the right under the representative cross-section requirement to challenge the defendant's use of peremptory challenges. *That issue is not now before this court.*" (39 Cal.3d at 682, fn. 10; emphasis added.) The California appellate court held in its opinion here that the latter comment did not alter the "mandate" of *Wheeler*. (186 Cal.App.3d Supp. 1, 7, fn. 2.)

state may deny a defendant that right on the basis of its own constitution or decisional law.

Lastly, respondent notes that a state need not give parties a right to any peremptory challenges at all. (Opp., pp. 10-17.) This is true, but irrelevant. If the right is provided, it may not be qualified in derogation of the United States Constitution. (See, for example, *Griffin v. Illinois* (1956) 351 U.S. 12, 18, 76 S.Ct. 585, 590 ["It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all . . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants . . . ."])

III.

PETITIONER WAS NOT REQUIRED TO MAKE A REDUNDANT AND FUTILE OBJECTION TO THE NEW JURY. IF THAT JURY WAS SELECTED UNDER INCORRECT RESTRICTIONS ON PETITIONER'S EXERCISE OF PEREMPTORY CHALLENGES, THE ERROR WAS PREJUDICIAL PER SE.

For the first time in this action, respondent argues petitioner should have lodged a formal objection to the new jury, after the first jury venire was quashed. [Opp., pp. 5-6.] Respondent presented no such argument in the California appellate court and, as noted above, the latter court did not rely on any such ground in reaching its decision. Therefore, this new contention by respondent should be disregarded.

Respondent also ignores [Opp., p. 6] both California and federal authorities that error in the jury selection process constitutes prejudice per se. (See *People v.*

Wheeler, supra, 22 Cal.3d at 283, citing *inter alia, Ballard v. U.S., supra,* 329 U.S. 187, 195, 91 L.Ed. 181, 186-187, 67 S.Ct. 261, 265; *People v. Turner* (1986) 42 Cal.3d 711, 728, citing *inter alia, Vasquez v. Hillery* (1986) ___ U.S. ___, 88 L.Ed.2d 598, 609, 106 S.Ct. 617, 623-624.)

IV.

THE ISSUE PRESENTED HERE IS CURRENT, IMPORTANT AND RIPE FOR ADJUDICATION.

In *Batson* this Court stated:

> "We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." (476 U.S. at ___, fn. 12, 106 S.Ct. at 1718, fn. 12.)

The above issue was argued in the California appellate court, was discussed on its merits in that court's opinion, and is discussed at length in the present petition and opposition.[3] Thus, except in the trial court where proceedings were conducted long before *Batson*, the very same issue as presented here was expressly litigated at all times.

Moreover, it appears undisputed that the issue here is "important" within the meaning of Supreme Court Rule 17.1. Respondent merely argues this Court should let the issue fester for some indeterminate period in the lower courts. However, having spoken only last year on the prosecutorial half of this peremptory challenge issue, it is appropriate now for this Honorable Court

---

[3]This Court's Rule 22.5 forbids any reply at this time to respondent's arguments on the merits, but petitioner most certainly will reply in the event briefs are permitted after certiorari is granted. (See Rule 25.2 and Rule 25.3.)

to speak on the defense half. Lower federal courts, state courts, prosecutors and defendants will all benefit from knowing — not guessing — the ultimate answer.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition for Writ of Certiorari, petitioner respectfully requests that this Honorable Court issue a writ of certiorari to review the issue reserved in *Batson*, i.e., whether the rule established there should be applied to defense counsel.

Respectfully submitted,

EDWARD J. HOROWITZ
A Professional Corporation

Attorney for Petitioner
HERBERT PAGEL

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on April 9, 1987, I served the within *Reply to Opposition to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Laurence Wayne Mooney
Deputy City Attorney
200 North Main Street
Room 1600
Los Angeles, California 90012

Clerk, Appellate Department
of the Superior Court
Department 70
111 North Hill Street
Los Angeles, California 90012

Honorable Larry Fidler
Criminal Courts Building
210 West Temple Street
Los Angeles, California 90012

Clerk, California Court
of Appeal
3580 Wilshire Boulevard
Room 301
Los Angeles, California 90010

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 9, 1987, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)